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Supreme Court of the United States

October Term, 1960

No. 901.

[redacted]

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

[redacted]

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 901.

JOHN TAXIN AND BERNARD TAXIN, TRADING AS JOHN TAXIN CO.,

Petitioners,

v.

SAMUEL P. MANDELL CO., INC., MANDELL DISTRIBUTING CO., INC., AND SAMUEL P. MANDELL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 181 F. Supp. 181 (E. D. Pa. 1960).

The opinion of the Court of Appeals for the Third Circuit affirming the decision of the District Court has not been officially reported and is printed as Exhibit A to the Petition for Certiorari.

QUESTIONS PRESENTED.

Was the Court of Appeals justified in sustaining a summary judgment entered by the District Court in favor of Respondents on the basis of a general release given by Petitioners to Respondents: (a) where Petitioners admitted that Respondents were not parties to misrepresentations alleged by Petitioners to have been made by other defendants to induce execution of the release; (b) where the undisputed documentary record shows conclusively that there is no genuine issue of fact with regard to Petitioners' conclusory allegations in their pleadings that misrepresentations had been made by the other defendants; (c) where it was admitted that Respondents paid an independent consideration for the release, which was negotiated between their counsel and Petitioners' counsel; and (d) where Petitioners refused to tender a return of that consideration?

RESPONDENTS' STATEMENT OF THE CASE.

On March 28, 1958 plaintiffs (Petitioners here) gave defendants (Respondents) a general release including specifically a release of all antitrust claims.[1] The release was negotiated between counsel for the parties, was under seal, and recited payment of the consideration of $18,000 (R. 18a-19a).

On September 11, 1959 plaintiffs filed this action, based on the same antitrust claims which they had already released, namely that Food Fair, certain of its executives and related companies (referred to as Food Fair) had conspired in 1949 with Samuel P. Mandell Co., Inc., Mandell Distributing Co., Inc. and Samuel P. Mandell (the Respondents here, referred to as Mandell) to restrain trade

1. Record references are to pages in the printed Court of Appeals' Appendix filed in this Court by Petitioners.

and commerce in the distribution of food and produce in the Philadelphia area. Defendants, in their answers, pleaded the release (R. 17a) and plaintiffs, having obtained leave to reply, alleged that they had been induced to sign the document "by reason of certain representations made by certain of the individual defendants, to wit, that in consideration of their executing the said document, plaintiffs were promised that Food Fair Stores, Inc. would purchase from them a minimum of $500,000 worth of fruit and produce per year; that plaintiffs would have to rely on the good faith of the defendants to perform since no written agreement setting forth the terms could or would be entered into." They also alleged that defendants never intended to carry out their promise and thereby fraudulently induced execution of the release. They further alleged that the release was obtained as part of the original conspiracy "as a prerequisite to dissolution of the S. P. Mandell Co., and the appointment of the said Samuel P. Mandell as a vice-president of Food Fair Stores, Inc." (R. 20a-21a). An affidavit of plaintiff, John Taxin, specified that the alleged promise was made on February 5, 1958, and only on that date (R. 33a-34a).

Plaintiffs made the following admissions of record in their depositions:

Mandell made no representations to plaintiffs to induce them to sign the release (R. 8b-9b). The release was executed voluntarily without coercion from any of the defendants (R. 8b-9b). Mandell was not present or represented at the meeting of February 5, 1958, where the promise is said to have been made, and was not alleged to have breached any promise to plaintiffs (R. 8b). Plaintiffs' claim of fraud was based solely on the failure by defendant Food Fair to carry out the alleged oral promise made seven weeks before the release, on February 5, 1958, by Louis Stein, president of Food Fair, to the effect that Food Fair would purchase from plaintiffs a minimum of $500,000 worth of fruit and produce per year (R. 4b-5b, 6b, 20a).

On February 7, 1958, plaintiffs' counsel, Gray, wrote to counsel for Food Fair, Shapiro, setting forth, with the knowledge and approval of plaintiffs, his understanding of the meeting of February 5, 1958 (R. 6b-7b). Gray's letter stated:

> "As the result of the last conference held on February 5 between our respective clients, we are now prepared to submit a final settlement proposal.
>
> "We understand that, by reason of the statements made at this last meeting by Messrs. Stein, Rosenberg and Marcus, supplementing the statements made at a prior meeting by Stein and Rosenberg, our clients are willing to accept, on faith, the commitment that they will be treated fairly hereafter in the matter of Food Fair's purchases of produce and that every effort will be made by Food Fair to give them a substantial share of such business.
>
> "Our clients, therefore, relying upon the good faith arrangements proposed by your clients, will execute an immediate release to be prepared by you, subject of course, to our approval. The consideration for the release we suggest should be the $25,000 figure which, among other expenditures, represents the out-of-pocket expense or obligations of our clients." (R. 30a-31a)

This letter made no reference to any promise to buy $500,000 worth of fruit and produce a year from plaintiffs, but, be that as it may, on February 11, 1958 Food Fair's counsel, Shapiro, replied in writing as follows:

> "I have talked to Harold Kohn who represents Mandell and who received a copy of your letter in re the above matter and I am writing to you on his behalf representing Mr. Mandell as well as for my client. It is our understanding from our clients that no such promises as you have set out in your letter were made to your clients at these conferences.

> "If the offer contained in your letter of February 7th is based upon the assumption that these promises were made and upon reliance that those alleged promises will be carried out, then the offer cannot be accepted. Secondly, our clients will not agree to pay any sum in excess of $15,000 as a fee to you as counsel in exchange for a fully complete release." (R. 32a)

Thereafter, as testified to, and not disputed by plaintiffs, the settlement was negotiated between counsel, Mandell being at all times represented by his own counsel, and the release was finally executed on March 28, 1958, reciting a consideration of $18,000 (R. 12b). Mandell himself had nothing to do with the settlement (R. 8b). His meetings with regard to the negotiation and execution of the release were solely with his own counsel (R. 12b). Mandell paid $12,000 of the consideration for the release (R. 12b). Plaintiffs have never tendered back any of this $18,000, though they admit $5,000 of it was returned to them personally by their counsel (R. 34a). Plaintiffs also admitted that all of the claims and causes of action set forth in the complaint were covered by the release (R. 4b-6b).

On the basis of this record, Mandell moved for summary judgment. In opposition to the motion, plaintiffs filed an affidavit of their former counsel, Gray, and of one of the plaintiffs, John Taxin (R. 28a-32a; 33a-34a). Gray's affidavit attached the letters of February 7 and 11, 1958 exchanged between himself and Food Fair's counsel, Shapiro. Gray stated in his affidavit that: ". . . on February 13, 1958, your deponent received a letter dated February 11, 1958, from Harry Shapiro, Esquire, a copy of which is attached hereto as Exhibit 'B'; that thereafter there were numerous conferences among counsel, resulting in the ultimate execution of a release on March 28, 1958; . . .", and that: ". . . at no time during these conferences was there any denial of the agreement by Food Fair Stores, Inc. to make the purchases as aforesaid; . . ." He nowhere averred, nor did plaintiff, John Taxin aver in his affidavit,

that any promise or representation regarding the purchase of fruit and produce from plaintiffs was made or renewed after the express repudiation of any such basis for settlement in Shapiro's letter of February 11, 1958. On the contrary, Taxin's affidavit recited that the sole promise relied on was made on February 5, 1958.

The District Court granted Mandell's motion for summary judgment on the ground that the record, based on plaintiffs' own admissions, was barren of any evidence of fraud on Mandell's part in obtaining the release. The Court of Appeals affirmed, and denied a petition for rehearing. After the affirmance by the Court of Appeals, the plaintiffs for the first time in any of the proceedings below contended that their admissions in their depositions did not in fact mean what they plainly said. The plaintiffs moved to enlarge the record in the Court of Appeals to include an affidavit changing the meaning of what they had said in their depositions. This motion was denied.

ARGUMENT.

The District Court and the Court of Appeals held that the Mandell defendants, who are the Respondents here, were given a general release, including a release of antitrust claims, by the plaintiffs on March 28, 1958, for which the plaintiffs were paid by the Mandell defendants independently a consideration of $12,000. Although this payment was made to the plaintiffs' counsel, it was used to discharge the plaintiffs' obligation to their counsel and part of it was returned by their counsel to the plaintiffs themselves. Attempting to avoid the effect of this release, the plaintiffs pleaded that it was obtained by fraud, the fraud allegedly consisting of the breach of an alleged promise by the other defendants.

However, they admitted unequivocally of record in their depositions that no fraud was committed by the Mandell defendants. It was uncontradicted in the record that the plaintiffs' counsel negotiated separately with counsel for the Mandell defendants for their release and that plaintiffs received a separate consideration from Mandell. No connection was ever alleged or shown between Mandell and the alleged fraudulent representation. The plaintiffs pleaded that the release was a continuing part of the original antitrust conspiracy, but that conspiracy, they claimed, began in 1949 whereas the release was not negotiated until 1958. As the Court of Appeals said: "In simple logic, a release given on March 28, 1958 could not facilitate any restraint of trade which had already been accomplished." The plaintiffs set forth nothing in their affidavits opposing the motion for summary judgment which would show any connection between the release and the general conspiracy and the Court of Appeals was justified in concluding that: "In such circumstances, we hold that it was at least incumbent upon plaintiffs, in opposing the motion for summary judgment, to state any special or unusual re-

lation which that release may have borne to the general conspiracy. Since nothing of that sort appears in the affidavits or was even suggested during the discussion of this point on oral argument, plaintiffs' unexplained and unsupported allegation that the obtaining of the release was part of or in furtherance of the original conspiracy does not suffice to prevent the granting of summary judgment."

Thus, on the undisputed facts in the record, summary judgment was fully justified. In the only decision of this Court cited in the plaintiffs' petition, *Associated Press v. United States*, 326 U. S. 1, it is noteworthy that on the basis of written records and admitted facts, summary judgment was held to be proper. This Court also sustained a summary judgment in another antitrust case, affirming the decree of the District Court in *United States v. Krasnov*, 143 F. Supp. 184 (E. D. Pa. 1956), affirmed 355 U. S. 5, on the basis of the uncontradicted documentary evidence in the record.

The Mandell defendants also argued in the courts below that the record sustained the granting of summary judgment on two other grounds. The first such ground was that the alleged fraudulent promise relied on by the plaintiffs was rejected in writing by counsel for all defendants prior to execution of the release (R. 30a-32a). Counsel for the defendants expressly wrote to counsel for plaintiffs: "If the offer contained in your letter of February 7th is based upon the assumption that these promises were made and upon reliance that those alleged promises will be carried out, then the offer cannot be accepted." With this express rejection before them, the plaintiffs thereafter executed the release, and the release itself contained no reference to any promise. The plaintiffs did not allege in any of their pleadings or affidavits that the defendants made any promise after the plaintiffs received the express rejection set forth in the above letter. The only promise they relied on was alleged to have been made on February 5th. This documentary record, under the principles of the *Kras-*

nor case, negates the entire basis of the plaintiffs' claim that the release was obtained by fraud or as part of a conspiracy, and is an additional ground justifying summary judgment for the defendants.

It was also argued below by the defendants that the plaintiffs could not challenge the release because they had not tendered back the consideration which they received for it, namely $12,000 from the Mandell defendants, and $6,000 from the other defendants. The Supreme Court of Pennsylvania held in *Nocito v. Lannuitti*, 402 Pa. 288 (1961), that a plaintiff's claim was barred by a release, which the plaintiff alleged was procured by fraud. At page 290, the court said: "If the procurement of this release was by fraud, when Nocito discovered it, he had his choice either to disaffirm the contract and offer to return to Lannuitti or his insurance carrier the consideration for this release or to affirm the voidable contract and waive the fraud. Nocito's failure to tender back the consideration after he discovered the alleged fraud constituted a waiver of the fraud and an affirmation of the contract . . ." Similarly in the present case, the plaintiffs having failed to tender back the consideration for the release, have affirmed it and are not in any position to challenge its effect.

The courts below did not find it necessary to discuss these two additional grounds sustaining the summary judgment in favor of the Mandell defendants, but the record itself supports these grounds conclusively.

There is no conflict in the circuits. The closest analogy is in *Martina Theatre Corp. v. Schine Chain Theatres, Inc.*, 278 F. 2d 798 (2d cir. 1960), in which the Second Circuit reached the same result. The cases relied on at page 6 of the Petition simply hold that on the records there involved, there were issues of fact precluding summary judgment. There are no such issues here. None of the other grounds which normally prompt this Court to grant a petition for certiorari exist here.

CONCLUSION.

For the reasons set forth above, the respondents submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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